Chapter 5: Petitions and Preliminary Hearings

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In this chapter. . .

This chapter deals with required procedures for delinquency and status offense cases in which the juvenile is in custody or custody has been requested. A petition must be filed and a preliminary hearing held if a juvenile is in custody or custody is requested. In contrast to the procedures described in Chapter 4, the procedures described in this chapter are required if the case will be treated formally—if a plea will be taken or a trial held. This chapter also discusses appointment of counsel, participation of a prosecuting attorney in delinquency proceedings, and selected requirements of the Crime Victim's Rights Act. The appendix contains a "bond matrix" that may be used to determine an appropriate amount of bail for a juvenile.*

*The "bond matrix" is reproduced with permission of R. Scott Ryder, Referee, 9th Circuit Court. Please note that the suggested amounts are based on values for 2002 and may need to be adjusted in the future to account for inflation.

A juvenile's right to appointed counsel in designated case and "automatic waiver" proceedings is discussed in Sections 17.3 and 20.4, respectively. Funding placement costs is discussed in Chapter 11.

> **Note on court rules.** On February 4, 2003, the Michigan Supreme Court approved extensive amendments to Subchapter 5.900 of the Michigan Court Rules, which govern delinquency, minor PPO, designated case, and "traditional waiver" proceedings, and to Subchapter 6.900, which govern "automatic waiver" proceedings. Subchapter 5.900 was renumbered Subchapter 3.900. These rule amendments are effective May 1, 2003. Although not in effect on the publication date of this benchbook, the rule amendments have been included here. For the rules in effect prior to May 1, 2003, see the first edition of this benchbook, *Juvenile Justice Benchbook:Delinquency & Criminal Proceedings* (MJI, 1998).

5.1 Petitions to Commence Proceedings in the Family Division

A petition* is "a complaint or other written allegation, verified in the manner provided in MCR 2.114(A), . . . that a juvenile has committed an offense." MCR 3.903(A)(19). The requirements for verification of pleadings are contained in MCR 2.114(B). A petition may be verified by an oath or affirmation of a party or other person having knowledge of the facts stated, or by a signed and dated declaration. MCR 2.114(B)(2).

*See SCAO Form JC 04.

"Any request for court action against a juvenile must be by written petition." MCR 3.931(A). MCR 3.931(C) qualifies this by providing that a citation or appearance ticket may be used to initiate proceedings involving certain charges. MCR 3.931(C) states as follows:

> "(1) A citation or appearance ticket may be used to initiate a delinquency proceeding if the charges against the juvenile are limited to:

> (a) violations of the Michigan Vehicle Code, or of a provision of an ordinance substantially corresponding to any provision of that law, as provided by MCL 712A.2b.
>
> (b) offenses that, if committed by an adult, would be appropriate for use of an appearance ticket under MCL 764.9c."
>
> "(2) The citation or appearance ticket shall be treated by the court as if it were a petition, except that it may not serve as a basis for pretrial detention."

Under MCL 712A.11(2) and MCR 3.914(B)(1), only the prosecuting attorney may file a petition requesting the court to take jurisdiction of a juvenile for having committed an offense that if committed by an adult would be a criminal offense. In contrast, any person may provide information to the court indicating that a juvenile has committed a status offense. MCL 712A.11(1).

*See Section 2.3 for a definition of status offenses.

Before the court may acquire formal jurisdiction of a case, the court must authorize a petition to be filed. MCL 712A.11(1) and (2). A "petition authorized to be filed" refers to written permission given by the court to file a petition containing allegations against the juvenile with the clerk of the court. MCR 3.903(A)(20). An authorized petition is deemed filed when it is delivered to, and accepted by, the clerk of the court. MCR 3.903(A)(9).

"If the juvenile obtains his or her seventeenth birthday after the filing of the petition, the court's jurisdiction shall continue beyond the juvenile's 17th birthday and the court may hear and dispose of the petition under [the Juvenile Code]." MCL 712A.11(4).

Traffic citations. MCL 712A.2b(a) states that "[n]o petition shall be required, but the court may act upon the written notice to appear given the accused juvenile as required by [MCL 257.728]." Citation means "a complaint or notice upon which a police officer shall record an occurrence involving 1 or more vehicle law violations by the person cited." MCL 257.727c(1). The Michigan Uniform Traffic Citation, issued by the Michigan State Police, has four parts:

- The original, or court copy, which is filed with the court.
- The police copy, which the citing officer retains.
- The misdemeanor copy, which is given to the offender if the charged offense is a misdemeanor.
- The civil infraction copy, which is given to the offender if the charged offense is a civil infraction. MCL 257.727c(1)(a)–(d).

MCR 3.933(A)(1) provides that the date and time for the juvenile's appearance will be set by the court. This will occur after the court receives the original copy of the citation.

5.2 Required Contents of Petitions

*See also MCR 5.113, which governs the general form of pleadings and papers filed in delinquency cases. MCR 3.901(A)(1).

A petition must be verified, must set forth plainly the facts that bring the juvenile within the Juvenile Code, and may be upon information and belief. MCL 712A.11(3).* The petition must contain the following information, if known, or if not known to the petitioner, be stated as unknown. MCL 712A.11(4) and MCR 3.931(B). MCR 3.931(B)(1)–(8) require a petition to contain the following information:

> "(1) the juvenile's name, address, and date of birth, if known;
>
> "(2) the names and addresses, if known, of
>
> (a) the juvenile's mother and father;
>
> (b) the guardian, legal custodian* or person having custody of the juvenile, if other than a mother or father;
>
> (c) the nearest known relative of the juvenile, if no parent, guardian or legal custodian can be found, and
>
> (d) any court with prior continuing jurisdiction;*
>
> "(3) sufficient allegations that, if true, would constitute an offense by the juvenile;
>
> "(4) a citation to the section of the Juvenile Code relied upon for jurisdiction;
>
> "(5) a citation to the federal, state, or local law or ordinance allegedly violated by the juvenile;
>
> "(6) the court action requested;
>
> "(7) if applicable, the notice required by MCL 257.732(7), and the juvenile's Michigan driver's license number;* and
>
> "(8) information required by MCR 3.206(A)(4), identifying whether a family division matter involving members of the same family is or was pending."*

*See Section 6.2 for the definitions of parent, "guardian" and "legal custodian."

*See Section 2.19 for the required procedures when a juvenile is subject to the prior continuing jurisdiction of another court.

*See Section 5.3, below.

*See Section 5.4, below.

The petition has two principal functions: to allow a court to determine if a statutory basis for jurisdiction exists, and to provide the juvenile notice of the charges against him or her. *In re Hatcher,* 443 Mich 426, 434, n 7 (1993). "Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must 'set forth the alleged misconduct with particularity.'" *In re Gault,* 387 US 1, 33 (1967) (citation omitted).

In *In re Weiss,* 224 Mich App 37, 41–42 (1997), the petition alleged that the juvenile misbehaved at school and violated criminal statutes and requested jurisdiction under the "incorrigibility" provision of the Juvenile Code, MCL 712A.2(a)(3). The Court of Appeals held that the petition provided the juvenile with sufficient notice of the charge to allow him to prepare a defense. Because disobedience to parental commands encompasses school misbehavior and illegal acts, the juvenile was on notice that such conduct might be considered at trial.

In *In re Lovell*, 226 Mich App 84 (1997), the prosecutor filed a petition charging a 16-year-old girl with assaulting her mother under MCL 750.81(2). The probate court refused to issue the petition, holding that the statute did not apply to assaults by children against parents. The prosecutor appealed to the circuit court, which also affirmed. The Court of Appeals reversed the lower courts' decision, holding that:

> "When a statute is clear and unambiguous, judicial interpretation is precluded. . . . Courts may not speculate regarding the probable intent of the Legislature beyond the words expressed in the statute. . . . [The statute] applies to offenders who resided in a household with the victim at or before the time of the assault . . . regardless of the victim's relationship with the offender." *Lovell, supra* at 87.

In so holding, the Court expressed no opinion as to whether its holding would permit application of the statute to assaultive behavior between college roomates who were not romantically involved. The dissenting judge on the *Lovell* panel would have required residence in the household plus a romantic involvement to trigger coverage under MCL 750.81(2).

In *In re Hawley,* 238 Mich App 509 (2000), the 15-year-old male respondent was charged with first-degree criminal sexual conduct under MCL 750.520b(1)(a) (sexual penetration of a person under 13 years old). The respondent allegedly engaged in consensual intercourse with a 12-year-old female, but the female was not charged with third-degree criminal sexual conduct under MCL 750.520d(1)(a) (sexual penetration with a person between 13 and 15 years old). The Court of Appeals set forth the test to determine whether a prosecution violates equal protection guarantees:

> "First, it must be shown that the defendants were 'singled' out for prosecution while others similarly situated were not prosecuted for the same conduct. Second, it must be established that this discriminatory selection in prosecution was based on an impermissible ground such as race, sex, religion or the exercise of a fundamental right." *Hawley, supra* at 513. (Citation omitted.)

The Court held that respondent's prosecution did not violate equal protection guarantees because it was not impermissibly based on gender. Respondent and the minor female were not similarly situated regarding their ages: although nobody under age 16 may consent to sexual intercourse, their situations are nevertheless distinguishable because persons under 13 years of age cannot consent to mere sexual contact. *Id.* at 513–14. The Court also found that respondent failed to support his assertion that the prosecuting attorney's decision to prosecute only him was based on gender. *Id.* at 514.

Successive charging of "minor in possession of alcohol" and possession of marijuana does not violate double jeopardy prohibitions because the laws at issue are intended to prevent substantially different societal harms. *In re Stark,* 250 Mich App 78, 80 (2002).

5.3 Required Notice When a Juvenile Is Charged With a Felony in Which a Motor Vehicle Was Used

MCR 3.931(B)(7) requires a petition to contain the notice provision contained in MCL 257.732(7), if applicable. MCL 257.732(7) states that when "a juvenile is accused of an act, the nature of which constitutes a felony in which a motor vehicle was used, other than [certain felonies listed below], the prosecuting attorney or family division of circuit court shall include the following statement on the petition filed in the court:

> "You are accused of an act the nature of which constitutes a felony in which a motor vehicle was used. If the accusation is found to be true and the judge or referee finds that the nature of the act constitutes a felony in which a motor vehicle was used, as defined in [MCL 257.319], your driver's license shall be suspended by the secretary of state."

"Felony in which a motor vehicle was used" is defined as a felony during which the juvenile operated a motor vehicle, and while operating the vehicle presented real or potential harm to persons or property, and one or more of the following circumstances existed:

"(i) The vehicle was used as an instrument of the felony.

"(ii) The vehicle was used to transport a victim of the felony.

"(iii) The vehicle was used to flee the scene of the felony.

"(iv) The vehicle was necessary for the commission of the felony." MCL 257.319(e)(i)–(iv).

Under MCL 257.732(7), the following felonies or attempts to commit these felonies are *excluded* from the definition of "felony in which a motor vehicle was used":

- taking possession of and driving away a motor vehicle, MCL 750.413;
- use of a motor vehicle without authority but without intent to steal, MCL 750.414;
- failure to obey a police or conservation officer's direction to stop, MCL 750.479a(2) or (3) and MCL 257.602a(2) or (3);
- felonious driving, MCL 752.191;
- negligent homicide with a motor vehicle, MCL 750.324;
- manslaughter with a motor vehicle, MCL 750.321;
- murder with a motor vehicle, MCL 750.316 (first-degree murder) and MCL 750.317 (second-degree murder);
- minor in possession, MCL 436.1703;
- fraudulently altering or forging documents pertaining to motor vehicles, MCL 257.257;
- perjury or false certification to Secretary of State, MCL 257.903;
- malicious destruction of trees, grass, shrubs, etc., with a motor vehicle, MCL 750.382(1)(c) or (d);
- failing to stop and disclose identity at the scene of an accident resulting in death or serious injury, MCL 257.617;
- certain "drunk driving" offenses; and
- a controlled substance violation under MCL 333.7401–333.7461, or 333.17766a, for which the defendant receives a minimum sentence of less than one year.

See MCL 257.732(4) and MCL 257.319 for the statutory sections that list these offenses. These offenses are excluded from the notice requirement of MCL 257.732(7) because the penalties for all of these listed offenses already require mandatory license suspension upon conviction.

5.4 Required Information About Other Court Matters Involving Members of the Same Family

A petition must identify whether a Family Division matter involving members of the same family is or was pending and contain the information required by MCR 3.206(A)(4). MCR 3.931(B)(8).

MCR 3.206(A)(4)(a)–(b) requires the petition to contain one of the two following statements:

> "(a) There is no other pending or resolved action within the jurisdiction of the family division of the circuit court involving the family or family members of the person[s] who [is/are] the subject of the complaint or petition.
>
> "(b) An action within the jurisdiction of the family division of the circuit court involving the family or family members of the person[s] who [is/are] the subject of the complaint or petition has been previously filed in [this court]/[____ Court], where it was given docket number ____ and was assigned to Judge ____. The action [remains]/[is no longer] pending."

Whenever practicable, two or more matters within the Family Division's jurisdiction pending in the same judicial circuit and involving members of the same family must be assigned to the judge who was assigned the first matter. MCL 600.1023(1).

*See Section 2.19 for a detailed discussion of MCR 3.205.

If a juvenile is subject to a prior or continuing order of any other court of this state, notice must be filed in such other court of any order subsequently entered under the Juvenile Code. MCL 712A.3a. MCR 3.927 provides that the manner of notice to the other court and the authority of the Family Division to proceed are governed by MCR 3.205.*

5.5 Amending a Petition

A petition may be amended at any stage of the proceedings as the ends of justice require. MCL 712A.11(6).

*See Chapter 12 (review of referees' recommended findings and conclusions).

Requirements for amending a petition to designate a case for criminal trial. "[A] referee licensed to practice law in Michigan may preside at a hearing . . . to amend a petition to designate a case and to make recommended findings and conclusions." MCR 3.913(A)(2)(c).*

MCR 3.951(A)(3)(a)–(b) set forth the following time requirements for amending a petition to designate a case for criminal trial when a "specified juvenile violation" is alleged.* These rules state as follows:

> "If a petition submitted by the prosecuting attorney alleging a specified juvenile violation did not include a designation of the case for trial as an adult:
>
> > (a) The prosecuting attorney may, by right, amend the petition to designate the case during the preliminary hearing.
> >
> > (b) The prosecuting attorney may request leave of the court to amend the petition to designate the case no later than the pretrial hearing or, if there is no pretrial hearing, at least 21 days before trial, absent good cause for further delay. The court may permit the prosecuting attorney to amend the petition to designate the case as the interests of justice require."

MCR 3.951(B)(3)(a)–(b) set forth time requirements for amending a petition to designate a case for criminal trial when an offense other than a "specified juvenile violation" is alleged. These rules state as follows:

> "If a petition submitted by the prosecuting attorney alleging an offense other than a specified juvenile violation did not include a request that the court designate the case for trial as an adult:
>
> > (a) The prosecuting attorney may, by right, amend the petition to request the court to designate the case during the preliminary hearing.
> >
> > (b) The prosecuting attorney may request leave of the court to amend the petition to request the court to designate the case no later than the pretrial hearing or, if there is no pretrial hearing, at least 21 days before trial, absent good cause for further delay. The court may permit the prosecuting attorney to amend the petition to request the court to designate the case as the interests of justice require."

*See Chapter 17 for a detailed discussion of the procedures required to initiate designated proceedings.

5.6 Preliminary Hearings

*See Section 4.2 for discussion of preliminary inquiries.

"A preliminary hearing is the formal review of the petition when the judge or referee considers authorizing the petition and placing the case on the formal calendar." *In re Hatcher,* 443 Mich 426, 434 (1993).*

*See Chapter 3 for a detailed discussion of the rules governing custody and detention of juveniles pending a hearing.

The court must hold a preliminary hearing if a juvenile is in custody or the petition requests detention. MCL 712A.14(2) and MCR 3.932(A). If a juvenile is apprehended and not released, a preliminary hearing must commence within 24 hours, and this hearing may be held at the place where the juvenile is being temporarily detained or "lodged."* If a juvenile is not in custody but custody is requested, a preliminary hearing may be conducted at any time. The preliminary hearing is considered the functional equivalent of the initial arraignment in adult criminal proceedings. *In re Wilson,* 113 Mich App 113, 121–22 (1982).

The court may assign a referee to conduct a preliminary hearing and to make recommended findings and conclusions. MCR 3.913(A)(1). MCR 3.913(A)(2)(a) and MCL 712A.10 do not require that referees who conduct preliminary hearings be licensed attorneys.

5.7 A Juvenile's Right to Counsel

A. Constitutional and Statutory Rights to Counsel

In *In re Gault,* 387 US 1, 41 (1967), the United States Supreme Court established a juvenile's right to counsel in delinquency proceedings:

> "We conclude that the Due Process Clause of the Fourteenth Amendment requires that in respect of proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed, the child and his parents must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child."

See also *People v Daoust,* 228 Mich App 1, 18–19 (1998), citing *Scott v Illinois,* 440 US 367, 373–74 (1979) ("we conclude that a juvenile is not deprived of his constitutional right to counsel in cases where the juvenile adjudication does not ultimately result in a deprivation of the juvenile's physical liberty by way of incarceration").

The constitutional right to counsel in delinquency proceedings extends to proceedings that occur after adjudication if the juvenile may face commitment to an institution. *Walls v Director of Institutional Services, Maxey Boy's Training School,* 84 Mich App 355, 359 (1978). A juvenile

also has a constitutional right to counsel during judicial or "traditional waiver" proceedings. *Kent v United States,* 383 US 541 (1966) and *People v McGilmer,* 95 Mich App 577, 580 (1980).

In addition to constitutional requirements, MCL 712A.17c(2)(a)–(e) state that the court must appoint an attorney for a juvenile if one or more of the following circumstances is present:

> "(a) The child's parent refuses or fails to appear and participate in the proceedings.
>
> "(b) The child's parent is the complainant or victim.
>
> "(c) The child and those responsible for his or her support are financially unable to employ an attorney and the child does not waive his or her right to an attorney.
>
> "(d) Those responsible for the child's support refuse or neglect to employ an attorney for the child and the child does not waive his or her right to an attorney.
>
> "(e) The court determines that the best interests of the child or the public require appointment."

MCR 3.915(A)(2)(a)–(e) contain substantially similar criteria for the appointment of counsel.

B. When Counsel Must Be Appointed

If a juvenile charged with an offense that would be a criminal offense if committed by an adult or a status offense is not represented by an attorney, the court must advise the juvenile of the right to the assistance of counsel at each stage of the proceedings. MCL 712A.17c(1). MCR 3.915(A)(1) states that this advice is required "at each stage of the proceedings *on the formal calendar,* including trial, plea of admission, and disposition." (Emphasis added.) The apparent discrepancy between the statute and court rule is explained by reference to the court rule governing preliminary hearings. MCR 3.935(B)(4) states that "if the hearing is to continue," i.e., if a judge or referee at the preliminary hearing is considering placing the case on the formal calendar, then the juvenile must be advised of the right to an attorney.*

*See Section 5.11, below.

Appointment of counsel before a preliminary hearing may be required because:

- a juvenile may waive the probable cause phase of a detention determination at a preliminary hearing only if the juvenile is represented by an attorney. MCR 3.935(D)(2);

- a "preliminary hearing may be conducted without a parent present provided a guardian ad litem or attorney appears with the juvenile." MCR 3.935(B)(1).

Appointment of counsel before a preliminary hearing also avoids adjourning the preliminary hearing to appoint an attorney and allows the attorney to facilitate an informal disposition of the case.

The appearance of defense counsel is governed by MCR 2.117(B). MCR 3.915(C). An attorney appointed by the court must serve until discharged by the court. MCL 712A.17c(9) and MCR 3.915(D). "An attorney retained by a party may withdraw only on order of the court." MCR 3.915(D).

C. Requirements for a Valid Waiver of Counsel

MCL 712A.17c(3) and MCR 3.915(A)(3) set forth the required procedures for a juvenile to waive his or her right to counsel. MCL 712A.17c(3) states as follows:

> "Except as otherwise provided in this subsection, in a proceeding under [MCL 712A.2(a) or (d) (criminal violations, status offenses, and violation of the "wayward minor" provisions)] the child may waive his or her right to an attorney. The waiver by a child shall be made in open court, on the record, and shall not be made unless the court finds on the record that the waiver was voluntarily and understandingly made. The child may not waive his or her right to an attorney if the child's parent or guardian ad litem objects or if the appointment is made under [MCL 712A.17c(2)(e)]."

MCR 3.915(A)(3) states:

> "**Waiver of Attorney.** The juvenile may waive the right to the assistance of an attorney except where a parent, guardian, legal custodian, or guardian ad litem objects or when the appointment is based on [MCR 3.915(A)(2)(e)]. The waiver by a juvenile must be made in open court to the judge or referee, who must find and place on the record that the waiver was voluntarily and understandingly made."

*See SCAO Form JC 06.

See also *In re Bennett,* 135 Mich App 559, 565 (1984) (as a best practice, the court should require the juvenile and parent, guardian, or custodian to sign a waiver of counsel form).*

D. Reimbursement of Attorney Costs

MCL 712A.17c(8) allows a court to enter an order assessing attorney costs.* That provision states as follows:

> "If an attorney . . . is appointed for a party under this act, after a determination of ability to pay the court may enter an order assessing attorney costs against the party or the person responsible for that party's support, or against the money allocated from marriage license fees for family counseling services under . . . MCL 551.103. An order assessing attorney costs may be enforced through contempt proceedings."

See also MCR 3.915(E), which is substantially similar to MCL 712A.17c(8), and MCL 712A.18(5) (reimbursement as part of order of disposition).

*See Section 11.7 for a detailed discussion of reimbursement of costs.

E. Appointment of a Guardian Ad Litem

The court may appoint a guardian ad litem for a party if the court finds that the welfare of the party requires it. MCR 3.916(A). See also MCL 712A.17c(10) (a court may appoint a guardian ad litem to assist it in determining a child's best interests). For rules governing the appearance and rights of guardians ad litem, and the responsibility for the costs of guardian ad litems, see MCR 3.916(B)–(D).

The relative importance of the guardian ad litem has declined as a result of the requirement that most juveniles must be represented by attorneys. Traditionally, a guardian ad litem's responsibility is to protect the best interests of the juvenile. Because in most instances the juvenile's attorney will fulfill this traditional function, a guardian ad litem should be appointed only if it appears to the court that the juvenile's attorney may not be able to protect the juvenile's best interests (for example, if the juvenile has severe mental health problems). A guardian ad litem may also be appointed whenever a juvenile appears without a parent. Martin, Dean & Webster, Michigan Court Rules Practice (3d ed), §5.993, p 807.

5.8 Appearance of a Prosecuting Attorney

MCL 712A.11(2) and MCR 3.914(B)(1) provide that only the prosecuting attorney may file a petition requesting the court to take jurisdiction of a juvenile allegedly within MCL 712A.2(a)(1) (criminal offenses). MCR 3.914(A) and 3.914(B)(2), and MCL 712A.17(4) provide that when a criminal offense is alleged, the prosecuting attorney must appear for the people if the proceeding requires a hearing and the taking of testimony. If the court requests, the prosecutor shall review petitions alleging non-

criminal offenses for legal sufficiency and appear for the people at a hearing. MCR 3.914(A).

The prosecuting attorney may be a county prosecuting attorney, an assistant prosecuting attorney for a county, the attorney general, the deputy attorney general, an assistant attorney general, or, if an ordinance violation is alleged, an attorney for the political subdivision or governmental entity that enacted the ordinance, charter, rule, or regulation upon which the ordinance violation is based. MCR 3.903(B)(4).

5.9 Time Requirements for Preliminary Hearings

*See Chapter 3 for a detailed discussion of the rules governing custody and detention of juveniles pending a hearing.

MCR 3.935(A)(1) states that a "preliminary hearing must commence no later than 24 hours after the juvenile has been taken into court custody, excluding Sundays and holidays, as defined by MCR 8.110(D)(2), or the juvenile must be released."* If a juvenile is not in custody but custody is requested, a preliminary hearing may be conducted at any time.

MCR 3.935(A)(2)(a)–(b) allows the court to adjourn the hearing for up to 14 days:

> "(a) to secure the attendance of the juvenile's parent, guardian, or legal custodian or of a witness, or
>
> "(b) for other good cause shown."

The Family Division may grant special adjournments when a juvenile is 14 years old or older and is alleged to have committed a "specified juvenile violation." See MCR 3.935(A)(3), which is discussed in detail in Section 3.6.

5.10 Notice Requirements for Preliminary Hearings

*See Section 6.4 for discussion of notice requirements for noncustodial parents.

Notice of a preliminary hearing must be given to the juvenile and his or her parent as soon as the hearing is scheduled, and the notice may be in person, in writing, on the record, or by telephone. MCR 3.920(C)(2)(a).*

The court must also direct that a guardian ad litem (if appointed) and a retained or appointed attorney for a juvenile be notified of each hearing. MCR 3.921(A)(1)(d) and (e). "The petitioner must be notified of the first hearing on the petition." MCR 3.921(A)(2). The prosecuting attorney must also be notified of a preliminary hearing. MCR 3.921(A)(1)(f).

5.11 Procedures at Preliminary Hearings

MCR 3.935(B)(1)–(7) outline the procedures to be followed at a preliminary hearing.

Presence of parent. "The court shall determine whether the parent has been notified and is present. The preliminary hearing may be conducted without a parent present provided a guardian ad litem or attorney appears with the juvenile." MCR 3.935(B)(1).

Reading the allegations in the petition. "The court shall read the allegations in the petition." MCR 3.935(B)(2). Although the rule does not authorize waiver of the reading of the allegations as often occurs in criminal proceedings, the reading is usually waived by counsel for the juvenile.

Deciding to continue with the hearing. Before taking testimony, the court must determine whether the petition should be dismissed, whether the matter should be diverted from formal court processes, whether the matter should be heard on the consent calendar, or whether the court should continue with the preliminary hearing. MCR 3.935(B)(3).*

*See Sections 4.4 (diversion) and 4.5 (consent calendar).

If the court determines that it will remove the case from the adjudicative process (i.e., dismiss the petition, divert the case, or place the case on the consent calendar), the court must comply with the requirements of the Crime Victim's Rights Act.*

*See Section 4.3 for a discussion of these requirements.

If the preliminary hearing is to continue, the court must advise the juvenile, in plain language and on the record, of:

> "(a) the right to an attorney pursuant to MCR 3.915(A)(1);*

*See Section 5.7, above.

> "(b) the right to trial by judge or jury on the allegations in the petition and that a referee may be assigned to hear the case unless demand for a jury or judge is filed pursuant to MCR 3.911 or 3.912;* and

*See Section 7.10.

> "(c) the privilege against self-incrimination, and that any statement by the juvenile may be used against the juvenile." MCR 3.935(B)(4)(a)–(c).

Opportunity to deny or plead to the allegations. "The juvenile must be allowed an opportunity to deny or otherwise plead to the allegations." MCR 3.935(B)(6).*

*See Chapter 8 (pleas of admission and nolo contendere).

Authorizing the filing of the petition. Unless the preliminary hearing is adjourned, the court must decide whether to authorize the filing of the petition. MCR 3.935(B)(7). The standard to determine whether a petition should be authorized for filing is contained in MCR 3.932(D), which states in part:

> "The court may authorize a petition to be filed and docketed on the formal calendar if it appears to the court that formal court action is in the best interest of the juvenile and the public."

When a judge or referee gives written permission to file a petition containing allegations against the juvenile, the petition is "authorized to be filed." MCR 3.903(A)(20).

If it authorizes the filing of the petition, the court must "determine if the juvenile should be released, with or without conditions, or detained, as provided in [MCR 3.935(C)–(F)]." MCR 3.935(B)(7)(b).*

*See Sections 5.12–5.13, below.

Determining whether the juvenile has been fingerprinted. MCR 3.935(B)(7)(a) and 3.936(B) provide that at the time the court authorizes the filing of a petition alleging a juvenile offense,* the court must examine the confidential files and verify that the juvenile has been fingerprinted.

*See Sections 25.11–25.13 for fingerprinting requirements.

If the juvenile has not been fingerprinted, the judge or referee must order the juvenile to submit to the appropriate agency for fingerprinting. MCR 3.936(B)(1).

Detention pending resumption of preliminary hearing. MCR 3.935(B)(8) states that "[a] juvenile may be detained pending the completion of the preliminary hearing if the conditions for detention under [MCR 3.935(D)] are established."

5.12 Detaining a Juvenile Pending Further Order or Trial

MCR 3.935(C)(1) lists factors that the court must consider to determine whether a juvenile is to be released, with or without conditions, or detained. Those factors are:

> "(i) the juvenile's family ties and relationships,
>
> "(ii) the juvenile's prior delinquency record,
>
> "(iii) the juvenile's record of appearance or nonappearance at court proceedings,
>
> "(iv) the violent nature of the alleged offense,
>
> "(v) the juvenile's prior history of committing acts that resulted in bodily injury to others,
>
> "(vi) the juvenile's character and mental condition,

> "(vii) the court's ability to supervise the juvenile if placed with a parent or relative, and
>
> "(viii) any other factor indicating the juvenile's ties to the community, the risk of nonappearance, and the danger to the juvenile or the public if the juvenile is released." MCR 3.935(C)(1)(a)–(h).

The court need not make findings concerning these factors. MCR 3.935(C)(2).

MCR 3.935(D)(1) contains the requirements for detaining a juvenile.

> "(1) **Conditions for Detention.** A juvenile may be ordered detained or continued in detention if the court finds probable cause to believe the juvenile committed the offense, and that one or more of the following circumstances are present:
>
> (a) the offense alleged is so serious that release would endanger the public safety;
>
> (b) the juvenile charged with an offense that would be a felony if committed by an adult will likely commit another offense pending trial, if released, and
>
> (i) another petition is pending against the juvenile,
>
> (ii) the juvenile is on probation, or
>
> (iii) the juvenile has a prior adjudication, but is not under the court's jurisdiction at the time of apprehension;
>
> (c) there is a substantial likelihood that if the juvenile is released to the parent, guardian, or legal custodian, with or without conditions, the juvenile will fail to appear at the next court proceeding;
>
> (d) the home conditions of the juvenile make detention necessary;
>
> (e) the juvenile has run away from home;*
>
> (f) the juvenile has failed to remain in a detention facility or nonsecure facility or placement in violation of a court order; or

*But see Section 3.8, for limitations on detention of status offenders.

> (g) pretrial detention is otherwise specifically authorized by law."

Pretrial detention is specifically authorized by MCL 712A.15(2). Several of this statute's provisions have been incorporated into MCR 3.935(D), but the following provisions have not and therefore also allow for detention pending a hearing:

> "(b) Those who have a record of unexcused failures to appear at juvenile court proceedings.
>
> "(f) Those who have allegedly violated a personal protection order and for whom it appears there is a substantial likelihood of retaliation or continued violation."

In *Schall v Martin,* 467 US 253 (1984), the United States Supreme Court upheld the constitutionality of a state's "preventive detention" statute, which allowed for pretrial detention if there was a serious risk of the juvenile committing another crime before the next court hearing. The Court concluded that the statutory scheme served the legitimate state objectives of protecting the community from crime and protecting a juvenile's welfare, and that the procedural protections satisfied due process requirements. *Id.* at 256–57, 264–66. The procedures required under the statutory scheme were notice, a hearing, a statement of facts and reasons for the detention, and a formal probable-cause hearing held within a short period of the detention determination. *Id.* at 277.

A. Evidence and Witnesses Needed to Establish Probable Cause

"The juvenile may contest the sufficiency of evidence by cross-examination of witnesses, presentation of defense witnesses, or by other evidence. The court shall permit the use of subpoena power to secure attendance of defense witnesses." MCR 3.935(D)(3).

"The Michigan Rules of Evidence do not apply, other than those with respect to privileges." *Id.*

B. Waiver of Probable Cause Phase of Detention Determination

"A juvenile may waive the probable cause determination required by [MCR 3.935(D)(1)] only if the juvenile is represented by an attorney." MCR 3.935(D)(2).

C. Required Findings

MCR 3.935(C)(2) requires the court to state the reasons for its decision to grant or deny release on the record or in a written memorandum.

D. Use of Probable Cause Finding in "Automatic Waiver" Proceeding

MCL 766.14(2) and MCR 6.911(B) require the magistrate to transfer the case "back" to the Family Division if, at the conclusion of the preliminary examination, the magistrate finds that a "specified juvenile violation" did not occur or that there is not probable cause to believe that the juvenile committed a "specified juvenile violation," but that there is probable cause to believe that some other offense occurred and that the juvenile committed that other offense.

MCR 3.939(A) states that the Family Division must hear and dispose of a case transferred pursuant to MCL 766.14 in the same manner as if the case had commenced in the Family Division. A petition that has been approved by the prosecuting attorney must be submitted to the court. Pursuant to MCR 3.939(B), the Family Division "may use the probable cause finding of the magistrate made at the preliminary examination to satisfy the probable cause requirement of MCR 3.935(D)(1)."

E. Use of Probable Cause Finding in "Traditional Waiver" Proceeding

The court need not conduct the first phase of a "traditional waiver" hearing if the court has found the requisite probable cause during the pretrial detention determination at a preliminary hearing under MCR 3.935(D)(1), provided that at the earlier hearing only legally admissible evidence was used to establish probable cause that the offense was committed and probable cause that the juvenile committed the offense. MCR 3.950(D)(1)(c)(i).

5.13 Conditional Release of a Juvenile Pending Resumption of a Preliminary Hearing, Further Order, or Trial

MCR 3.935(E)(1) states as follows:

> "(1) The court may release a juvenile to a parent pending resumption of the preliminary hearing, pending trial, or until further order without conditions, or, if the court determines that release with conditions is necessary to reasonably ensure the appearance of the juvenile as required or to reasonably ensure the safety of the public, the court may, in its discretion, order that the release of the juvenile be on the condition or combination of conditions that the court determines to be appropriate, including, but not limited to:

> (a) that the juvenile will not commit any offense while released,
>
> (b) that the juvenile will not use alcohol or any controlled substance or tobacco product,
>
> (c) that the juvenile will participate in a substance abuse assessment, testing, or treatment program,
>
> (d) that the juvenile will participate in a treatment program for a physical or mental condition,
>
> (e) that the juvenile will comply with restrictions on personal associations or place or residence,
>
> (f) that the juvenile will comply with a specified curfew,
>
> (g) that the juvenile will maintain appropriate behavior and attendance at an educational program, and
>
> (h) that the juvenile's driver's license or passport will be surrendered." MCR 3.935(E)(1)(a)–(h).

A. Violations of Conditions of Release

If a juvenile allegedly violates a condition of release, the court may order the juvenile to be apprehended and detained immediately. MCR 3.935(E)(2). After providing the juvenile with an opportunity to be heard regarding the alleged violation, the court may modify the juvenile's conditions of release or revoke the juvenile's release. *Id.*

B. Bail

Right to post bail. MCR 3.935(F) states that "[i]n addition to any other conditions of release, the court may require a parent, guardian, or legal custodian to post bail." MCL 712A.17(3) provides that a parent, guardian, or custodian has a right to give bond or other security for a juvenile's appearance at trial.

Cash or surety bond. MCR 3.935(F)(1) gives a parent, guardian, or legal custodian the option of posting a surety bond or cash bail. That rule states as follows:

> "The court may require a parent, guardian, or legal custodian to post a surety bond or cash in the full amount of the bail, at the option the parent, guardian, or legal custodian. A surety bond must be written by a person or company licensed to write surety bonds and who is

> approved by the court. Except as otherwise provided by this rule, MCR 3.604 applies to bonds posted under this rule."

Unless the court requires a surety bond or cash in the full amount of bail as provided in MCR 3.935(F)(1), the court must advise the parent, guardian, or legal custodian of the option to satisfy the monetary requirement of bail by:

> "(a) posting either cash or a surety bond in the full amount of bail set by the court or a surety bond written by a person or company licensed to write surety bonds in Michigan, or
>
> "(b) depositing with the register, clerk, or cashier of the court currency equal to 10 percent of the bail, but at least $10." MCR 3.935(F)(2)(a)–(b).

Revocation or modification of bail. "The court may modify or revoke the bail for good cause after providing the parties notice and an opportunity to be heard." MCR 3.935(F)(3).

Return or forfeiture of money bail. MCR 3.935(F)(4)–(5) deal with the return or forfeiture of money bail. Those rules state as follows:

> "(4) **Return of Bail.** If the conditions of bail are met, the court shall discharge any surety.
>
> (a) If disposition imposes reimbursement or costs, the bail money posted by the parent must first be applied to the amount of reimbursement and costs, and the balance, if any, returned.
>
> (b) If the juvenile is discharged from all obligations in the case, the court shall return the cash posted, or return 90 percent and retain 10 percent if the amount posted represented 10 percent of the bail.
>
> "(5) **Forfeiture.** If the conditions of bail are not met, the court may issue a writ for the apprehension of the juvenile and enter an order declaring the bail money, if any, forfeited.
>
> (a) The court must immediately mail notice of the forfeiture order to the parent at the last known address and to any surety.
>
> (b) If the juvenile does not appear and surrender to the court within 28 days from the forfeiture date, or does not within the period satisfy the

> court that the juvenile is not at fault, the court may enter judgment against the parent and surety, if any, for the entire amount of the bail and, when allowed, costs of the court proceedings."

5.14 Permitted Placements Following Preliminary Hearing

*See Sections 3.7–3.8 for further discussion of the requirements of MCL 712A.15 and MCL 712A.16.

MCR 3.935(D)(4) provides that a detained juvenile must be placed in the least restrictive environment that will meet the needs of the juvenile and the public, and that will conform to the statutory requirements of MCL 712A.15 and MCL 712A.16.*

Counties may establish their own homes or facilities. MCL 712A.16(2) allows a county or counties contracting together to "provide for the diagnosis, treatment, care, training, and detention of juveniles in a child care home or facility conducted as an agency of the county if the home or facility meets the licensing standards [in MCL 722.111–722.128]."

MCL 712A.16(2)(a)–(c) also state that a court or court-approved agency may "arrange for the boarding of juveniles" in the following homes or facilities:

> "(a) If a juvenile is within the court's jurisdiction under [MCL 712A.2(a), criminal and status offenses], a suitable foster care home subject to the court's supervision. . . .
>
> "(b) A child caring institution or child placing agency licensed by the department of consumer and industry services to receive for care juveniles within the court's jurisdiction.*
>
> "(c) If in a room or ward separate and apart from adult criminals, the county jail for juveniles over 17 years of age within the court's jurisdiction."

*For a statewide list of licensed institutions and agencies, go to www.cis.state.mi.us/brs.

MCL 712A.14(3) adds that if a complaint is authorized following a preliminary hearing, a juvenile may be placed in any of the following "pending investigation and hearing":

> "(a) In the home of the child's parent, guardian, or custodian.
>
> "(b) If a child is within the court's jurisdiction under [MCL 712A.2(a), criminal and status offenses], in a suitable foster care home subject to the court's supervision. . . .

> "(c) In a child care institution or child placing agency licensed by the state department of social services to receive for care children within the jurisdiction of the court.
>
> "(d) In a suitable place of detention." MCL 712A.14(3)(a)–(d).

5.15 Required Procedures for Placement of Indian Children in Status Offense and "Wayward Minor" Cases

"A removal hearing must be completed within 28 days of removal from the parent or Indian custodian." MCR 3.980(C). MCR 3.980(C)(1) contains the evidentiary requirements that must be met before an Indian child is removed from his or her home. That rule states:

> "(a) An Indian child must not be removed from a parent or Indian custodian without clear and convincing evidence that services designed to prevent the break up of the Indian family have been furnished to the family and that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical injury to the child.
>
> "(b) Evidence at the removal hearing must include the testimony or expert witnesses who have knowledge about the child-rearing practices of the Indian child's tribe."

Evidentiary requirements. Except for cases of emergency removal, an Indian child shall not be removed from the home unless there is clear and convincing evidence, including testimony by qualified expert witnesses, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child. MCR 3.980(C)(1) and 25 USC 1912(e).

In addition, the petitioner must satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful. 25 USC 1912(d). See *In re Kreft,* 148 Mich App 682, 693–95 (1986) (requirements met by provision of parenting assistance, infant nutrition information, and housing assistance).

For purposes of the Indian Child Welfare Act (ICWA), "expert witness" means:

- a member of the tribe recognized by the tribal community as knowledgeable in tribal customs related to family organizations and child-rearing practices;
- a lay expert with substantial experience with delivery of services to Indian families and extensive knowledge of prevailing social and cultural standards and child-rearing practices within the tribe; or
- a professional with substantial education and experience in his or her field.

In re Elliott, 218 Mich App 196, 206–08 (1996), citing *In re Kreft*, 148 Mich App 682, 689–93 (1986). If cultural bias is not implicated in the case, the expert witness need not have special knowledge of Indian culture, but the witness must have more specialized knowledge than the normal social worker. *Elliott, supra* at 207.

Preferred placements. Unless the child's tribe has established a different order of preference, the Indian child, if removed from his or her home, shall be placed, in descending order of preference, with:

> "(a) a member of the child's extended family,
>
> "(b) a foster home licensed, approved, or specified by the child's tribe,
>
> "(c) an Indian foster family licensed or approved by a non-Indian licensing authority,
>
> "(d) an institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the child's needs." MCR 3.980(C)(2)(a)–(d)

25 USC 1915(b)(i)–(iv) contain substantially similar preferences. In addition, the court may order another placement for good cause shown. MCR 3.980(C).

"Extended family" is defined by law or custom of the child's tribe or, if there is no applicable law or custom, as a person 18 years of age or older who is the child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent. 25 USC 1903(2).

If the child's tribe has established a different order of preference by resolution, the court or agency making the placement must follow that order of preference if the resulting placement is the least restrictive setting appropriate to the needs of the child. 25 USC 1915(c).

The agency or court may consider the preference of the parent or custodian when appropriate, and the agency or court must give weight to the parent's or custodian's desire for anonymity when applying either the statutory or tribal preferences. 25 USC 1915(c).

The prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family maintains social and cultural ties must be applied when meeting the preference requirements. 25 USC 1915(d).

5.16 Records of Proceedings at Preliminary Hearings

MCR 3.925(B) states that "[a] record of all hearings must be made."

5.17 Requirements of the Crime Victim's Rights Act

The Crime Victim's Rights Act generally places responsibility on the investigating agency and prosecuting attorney for providing certain notices to the victim and for certain other duties. Some responsibilities, however, remain with courts, including:

- ensuring a victim has an opportunity to be heard before the court removes a case from the adjudicative process;* *See Section 4.3(D).
- notifying a victim of the right to make a statement at disposition and identifying the writer of the disposition report;* *See Section 10.7.
- ensuring a victim has an opportunity to make a victim impact statement;* *See Section 10.7.
- notifying parents of their responsibility for victim restitution;* *See Section 10.12(L).
- reporting a juvenile's noncompliance with a restitution order to the prosecutor;* *See Section 10.12(O).
- providing the victim with a certified copy of the order of adjudication;* *See Section 25.4.
- notifying the victim of a juvenile's escape from custody or detention for committing a subsequent offense; and* *See Section 10.10.
- notifying the victim when the juvenile is dismissed from court jurisdiction.* *See Section 14.8(C).

In addition, under MCL 780.798a, the court may perform notification functions delegated to the prosecuting attorney if:

- the prosecuting attorney allows the court to do so pursuant to a written agreement, and
- the court performed those functions before May 1, 1994.

A. Requirements for Charging Documents

For any offense falling under the juvenile article of the CVRA, the law enforcement agency must file with the charging document a separate list of the names, addresses, and telephone numbers of each victim. This separate list is not a matter of public record. MCL 780.784. See also MCR 3.903(A)(3)(a)(ii) (the definition of "confidential files" includes this separate statement of victims).

Pursuant to MCL 780.783a, if the complaint, petition, appearance ticket, traffic citation, or other charging instrument charges one of several listed offenses, or a violation of a local ordinance substantially corresponding to one of these offenses, the law enforcement officer or prosecutor must state on the charging instrument "that the offense resulted in damage to another individual's property or physical injury or death to another individual." This statement must be included in the charging document because the juvenile article of the CVRA only applies to these listed offenses when property damage, physical injury, or death results.

MCL 780.781(1)(f)(iii)–(v) contain the offenses to which this requirement applies when the case falls under the juvenile article of the CVRA. The juvenile offenses are:

- leaving the scene of a personal-injury accident, MCL 257.617a;
- operating a vehicle while under the influence of or impaired by intoxicating liquor or a controlled substance, or with an unlawful blood-alcohol content, MCL 257.625;
- selling or furnishing alcoholic liquor to an individual less than 21 years of age, MCL 436.1701;* and
- operating a vessel while under the influence of or impaired by intoxicating liquor or a controlled substance, or with an unlawful blood-alcohol content, MCL 324.80176(1) or (3).

*The CVRA applies to this offense only if physical injury or death resulted; it does not apply if the offense resulted in property damage.

B. Victim Notification Requirements

The prosecuting attorney or court must provide information on court procedures and legal rights to each victim "[w]ithin 72 hours after the prosecuting attorney . . . submits a petition" to the court. This information must be written in plain English. MCL 780.786(2). The prosecuting attorney must give each victim the following:

> "(a) A brief statement of the procedural steps in processing a juvenile case, including the fact that a juvenile may be tried in the same manner as an adult in a designated case or waived to the court of general criminal jurisdiction.
>
> "(b) A specific list of the rights and procedures under this article.
>
> "(c) A convenient means for the victim to notify the prosecuting attorney that the victim chooses to exercise his or her rights under this article.
>
> "(d) Details and eligibility requirements [for crime victim compensation].
>
> "(e) Suggested procedures if the victim is subjected to threats or intimidation.
>
> "(f) The person to contact for further information." MCL 780.786(2)(a)–(f).

If the victim requests, the prosecuting attorney or court must give notice to the victim of any scheduled court proceedings and any changes in the schedule of court proceedings. MCL 780.786(3). This requirement encompasses all court proceedings, including pretrial conferences, pre- and post-trial motion hearings, adjournments and continuances, and all schedule changes.

C. Revocation of Release

The prosecuting attorney must notify the victim of suggested procedures to follow if threatened or intimidated by or at the direction of the juvenile. MCL 780.786(2)(e). The prosecutor must provide this notice within 72 hours after the prosecuting attorney files or submits a petition. MCL 780.786(2). Typically, victims are advised to immediately contact the police, prosecuting attorney, or "victim-witness assistant" if threatened or intimidated. Victims may also be advised to seek a personal protection order (PPO).

The CVRA allows for revocation of the alleged offender's release based on threats or violence against the victim or the victim's immediate family. MCL 780.785(2) states:

> "Based upon any credible evidence of acts or threats of physical violence or intimidation by the juvenile or at the juvenile's direction against the victim or the victim's immediate family, the prosecuting attorney may move

> that the bond or personal recognizance of a juvenile be revoked."

Victim and witness intimidation may be case-specific (intended to dissuade a victim or witness from testifying in a particular case) or community-wide. In the latter case, acts by youth gangs or drug-selling groups create a general atmosphere of fear within a neighborhood or community. Healy, *Victim and Witness Intimidation: New Developments and Emerging Responses* (Washington, DC: National Institute of Justice, 1995), p 1. Victims and witnesses may be deterred from testifying even though no overt threat is made. *Id.* at 3. Threats may be indirect, such as when gang or group members park outside the victim's or witness' house, issue vague verbal warnings, use threatening hand gestures, or "pack the courtroom" with gang or group members. *Id.* at 4. The provisions of the CVRA discussed above allow revocation of release based upon the victim's reasonable apprehension of threat or intimidation, and the reasonableness of the victim's apprehension may be interpreted in light of the prevailing atmosphere in a neighborhood or community.